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Nos. 82-1191, 82-1207 and 82-1208

In the Supreme Court of the United States

OCTOBER TERM, 1982

IVAN STEPHANS, PETITIONER

v.

UNITED STATES OF AMERICA

FRANK J. VADINO, PETITIONER

v.

UNITED STATES OF AMERICA

RALPH NATALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in refusing to ask the prospective jurors on voir dire whether they would be influenced unduly by the testimony of government agents.

2. Whether the admission of certain co-conspirator statements against petitioner Stephans was reversible error.

3. Whether evidence of certain telephone conversations was obtained in violation of petitioner Stephans' Fourth Amendment rights.

4. Whether the district court gave a defective entrapment instruction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A5-A23)[1] is reported at 680 F.2d 1329.

[1] "Pet. App." refers to the petition in No. 82-1207. The petition in No. 82-1191 refers to the petitioner as Ivan Stephens, while the court of appeals opinion refers to him as Ivan Stephans. For purposes of consistency, this brief uses the latter spelling.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1982. A petition for rehearing was denied on November 15, 1982. The petition for a writ of certiorari in No. 82-1191 was filed on January 14, 1983. The petitions in Nos. 82-1207 and 82-1208 were filed on January 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, each petitioner was convicted of conspiracy to possess controlled substances with intent to distribute, in violation of 21 U.S.C. 846 (Count 1). In addition, petitioner Stephans was convicted on two counts (Counts 2 and 3) of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and petitioners Vadino and Natale were convicted on one count of that offense. Petitioner Vadino was also convicted of using a telephone to facilitate a drug offense, in violation of 21 U.S.C. 843 (Count 6). Petitioner Natale was sentenced to concurrent 15-year prison terms on Counts 1 and 2 and fined $10,000. Petitioner Vadino was sentenced to concurrent prison terms of eight years on Counts 1 and 2 and one year on Count 6, and fined $21,000. Petitioner Stephans was sentenced to consecutive prison terms of five years on Counts 1 and 2, and to a three-year prison term on Count 3 to be served concurrently with the sentence imposed on Count 2; he was also fined $2,000. The court of appeals affirmed (Pet. App. A5-A23).

The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A12-A13). It showed that government informant Charles Allen introduced undercover DEA agents to petitioners Vadino and Natale. Thereafter the agents participated in a series of negotiations with all three petitioners for the purchase by the agents of 500,000 Quaaludes and 10 kilograms of cocaine (*id.* at A12).

Petitioners Vadino and Stephans, together with co-defendant Eduardo Comesana, attempted to deliver the drugs. At Stephans' direction, Comesana left the designated place of delivery and returned with one kilogram of cocaine, which Stephans weighed and tested. No further drugs were brought to the delivery site before arrests were made. Following the arrests, and while the agents were still present at the place of delivery, one of the agents answered a telephone call from Stephans' wife. The agent told her that Stephans wanted her to "bring the stuff over." She replied that she could not because she had a runner there. Later that day agents entered the Stephans' home with Mrs. Stephans' consent (Pet. App. A12, A17). A few minutes later a search warrant was issued, pursuant to which the agents searched the house and found cocaine, Quaaludes, narcotics paraphernalia, and handwritten notes bearing the name of co-defendant Elio Perez-Herrera (*id.* at A12).

While in the Stephans' house, Agent Mark Bumar answered a telephone call from Perez-Herrera, who identified himself as Stephans' "source of supply for drugs." Pet. App. A12. That day and the next day Bumar had several telephone conversations with Perez-Herrera. Tapes of these conversations were played at trial. In the first call, Bumar told Perez-Herrera he was waiting for Stephans in order to complete a drug purchase. Perez-Herrera identified himself as Stephans' source of supply for drugs and asked Bumar to have Stephans return his call. In later calls Bumar asked if Perez-Herrera had promised Stephans ten kilograms of cocaine, and Perez-Herrera answered in the affirmative. Bumar referred to Stephans' "promising us 10 from you," and Perez-Herrera again answered affirmatively. Perez-Herrera also told Bumar that Stephans had called him that day and asked for 500,000 Quaaludes. He told Bumar that he was expecting a million and a half Quaaludes the next day (*id.* at A12-A13).

ARGUMENT

1. Petitioners contend (82-1191 Pet. 9-16; 82-1207 Pet. 2-7; 82-1208 Pet. 2-7) that the district court erred in refusing their request to ask the prospective jurors on voir dire whether they would be inclined to give greater credence to the testimony of the DEA agents than to the testimony of other witnesses merely because the agents were law enforcement officers. Petitioners rely on several cases holding that such a question should be asked when requested by the defense. *United States* v. *Baldwin*, 607 F.2d 1295 (9th Cir. 1979); *United States* v. *Martin*, 507 F.2d 428, 432-433 (7th Cir. 1974); *Brown* v. *United States*, 338 F.2d 543, 544-545 (D.C. Cir. 1964); *Sellers* v. *United States*, 271 F.2d 475, 476 (D.C. Cir. 1959).[2] None of these cases, however, holds that the refusal to ask such questions on voir dire is per se error. Indeed, as the court stated in *Baldwin*, "[a]ll circuits appear to be in agreement that the refusal to ask the question of whether the prospective jurors would be unduly influenced by the testimony of a law enforcement officer does not always constitute reversible error; that question hinges upon such factors as the importance of the government agent's testimony to the case as a whole; the extent to which the question concerning the venireperson's attitude toward government agents is covered in other questions on voir dire and on the charge to the jury; the extent to which the credibility of the government agent-witness is put into issue; and the extent to which the testimony of the government agent is corroborated by non-agent witnesses." 607 F.2d at 1298. See also *Brown* v. *United States*, *supra*, 338 F.2d at 545; *United States* v. *McGregor*, 529 F.2d 928, 931 (9th

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[2]Petitioners also rely on *Chavez* v. *United States*, 258 F.2d 816, 819 (10th Cir. 1958), cert. denied, 359 U.S. 916 (1959). In that case, however, the court's comments were dictum and the proposed voir dire question differed from the one involved here. The conviction in *Chavez* was affirmed.

Cir. 1976); *United States* v. *Golden*, 532 F.2d 1244, 1247 (9th Cir.), cert. denied, 429 U.S. 842 (1976); *Ross* v. *United States*, 374 F.2d 97, 105 (8th Cir.), cert. denied, 389 U.S. 882 (1967); *Gorin* v. *United States*, 313 F.2d 641, 647 (1st Cir.), cert. denied, 374 U.S. 829 (1963). Cf. *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981).

This case presents none of the factors that some courts have deemed grounds for reversal. Petitioners offered no evidence in their own behalf. The defense of petitioners Vadino and Natale was that they had been entrapped by the nonofficer informant Charles Allen and, indeed, their counsel admitted during opening and closing argument that Vadino and Natale had committed the acts about which the agents testified (2 Tr. 220, 239; 7 Tr. 1333; see Pet. App. A13, A19).[3] See *United States* v. *Gore*, 435 F.2d 1110, 1113 (4th Cir. 1970) (holding refusal to ask identical question harmless where police officers' testimony was undisputed). Moreover, the agents' testimony was substantially corroborated at trial by tape recordings of conversations between Vadino and Natale and the undercover agents (3 Tr. 485-488, 488-491, 492-496, 498-508, 512-514, 515-523, 524-528). In addition, the court conducted a thorough inquiry into possible bias[4] and carefully instructed the jury about the

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[3]In his opening statement, Natale's attorney remarked that " [m]ost of the things, * * * and I am only going to talk about my client, most of the things that the prosecutor said [were] correct" (2 Tr. 220). In his closing argument he repeated this comment verbatim (7 Tr. 1333). Likewise, Vadino's counsel stated in his opening remarks that "for purpose[s] of my client only, I admit that Frank Vadino did substantially what [the prosecutor] said * * *" (2 Tr. 239).

[4]The court asked the jurors, among other things, whether any member of their family or close friend had ever served as a law enforcement officer (1 Tr. 74); whether they or a member of their family had ever been a crime victim or had participated in a criminal case as a complainant or witness (1 Tr. 65); and whether they knew of any reason why they could not be fair or impartial jurors (1 Tr. 76).

factors to be considered in weighing the testimony of witnesses, including their relationship to the government or the defendants and their interest in the outcome of the case (1 Tr. 142; 7 Tr. 1428).

In sum, the inquiry into the prejudicial potential of the failure to ask prospective jurors about their attitude toward police testimony turns upon the facts and circumstances of the particular case. In the circumstances of this case, the district court's refusal to ask the proposed question could not have prejudiced petitioners, and there is no basis to conclude that any court of appeals would have reversed their convictions. The issue does not warrant this Court's review.

2. On appeal, petitioners argued that co-defendant Perez-Herrera's telephone conversations with Agent Bumar were improperly admitted under the co-conspirator hearsay rule (Fed. R. Evid. 801(d)(2)(E)) because Perez-Herrera was not shown by independent evidence to have been a member of the conspiracy and because his statements were not made in furtherance of the conspiracy. The government's brief in the court of appeals (at 44-45, 46-47) acknowledged that a sufficient showing had not been made to establish the admissibility of these statements, but argued that the error was harmless. The court accepted the government's argument (Pet. App. A15-A16). Petitioner Stephans contends (82-1191 Pet. 32-5[5]) that this determination was incorrect.

Assuming the constitutional harmless error standard is even applicable here,[5] the court of appeals correctly concluded (Pet. App. A25) that the admission of Perez-

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[5]Any claim that the admission of Perez-Herrera's statements was constitutional error must be predicated on a violation of the Confrontation Clause. However, it is well established that the Confrontation Clause and the hearsay rule are not coextensive. See *Ohio* v. *Roberts*, 448 U.S. 56, 63 (1980); *Dutton* v. *Evans*, 400 U.S. 74, 80 (1970). Even

Herrera's statements against Stephans was harmless beyond a reasonable doubt. The other evidence against Stephans overwhelmingly established that he participated in the negotiations with the agents, that he delivered samples of drugs to the agents at one of the meetings (2 Tr. 298), and that later he took charge of the attempted delivery of the drugs.

Stephans, however, makes three arguments. First, he argues (82-1191 Pet. 36-38, 47) that the admission of the statements was not harmless because they implicated him in extrinsic crimes. However, the evidence of Stephans' ongoing drug business was wholly cumulative. Other evidence showed that Stephans had an "excellent supply" of Quaaludes (2 Tr. 299), that he maintained a house to store illicit drugs which was equipped with a closed circuit television system, tape on the windows, and bright lights (2 Tr. 338), and that he kept drugs and drug paraphernalia in his living quarters (2 Tr. 901-999, 1032-1035). In addition, after one of the meetings with the agents at which Stephans indicated the place and method of delivery of the drugs, petitioner Vadino told the agents in a taped telephone conversation that was played for the jury that he and Stephans had

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where the admission of out-of-court declarations violates the hearsay rule, it does not violate the Confrontation Clause if the declarant is unavailable to testify and his declarations bear "indicia of reliability." *Ohio* v. *Roberts, supra*, 448 U.S. at 65-66. Here, since Perez-Herrera was a co-defendant at Stephans' trial, he could not be compelled to testify. And his statements bore substantial indicia of reliability in view of the fact that he expressly urged Bumar to check with Stephans, whom he believed Bumar would be in contact with shortly, so that Stephans could vouch for his credibility (5 Tr. 1969). If Perez-Herrera had intended to mislead Bumar about his relationship with Stephans, that action would have made no sense at all.

employed the same procedure in previous drug transactions (3 Tr. 503).[6]

Second, Stephans argues (82-1191 Pet. 38) that the admission of Perez-Herrera's statements was not harmless because, without them, the government's entire case against him would have consisted of agent testimony. This simply is not true. The testimony of the agents concerning Stephans' participation in the conspiracy was strongly corroborated by tape-recorded telephone conversations between the agents and petitioners Natale and Vadino (3 Tr. 493, 503, 513). Furthermore, Stephans overstates the extent to which the agents' credibility was at issue here. Neither Stephans nor his co-defendants offered any evidence at trial contradicting the testimony of the agents. Indeed, Stephans presented no identifiable defense at all (see Pet. App. A16).

Finally, Stephans argues (82-1191 Pet. 44-47) that the admission of Perez-Herrera's statements was not harmless because the prosecutor referred to them in his closing argument. It is true that the prosecutor discussed the Perez-Herrera tapes in his closing argument (7 Tr. 1324-1325), but he did so in the course of reviewing the evidence against Perez-Herrera, not against Stephans. By that point in his closing argument, the prosecutor had already summarized the government's overwhelming case against Stephans and the other petitioners without referring to the Perez-Herrera

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[6]Stephans cites *United States* v. *Webster*, 649 F.2d 346 (5th Cir. 1981), for the proposition that hearsay evidence cannot be harmless if it relates to extrinsic criminal activity. In that case, Webster presented an entrapment defense and the issue of his predisposition to commit crime was critical. Although the court held that the admission of extrinsic-crime hearsay evidence was not harmless in those circumstances, it did not remotely suggest that reversal would be required in a different setting. Here, Stephans did not assert an entrapment defense.

tapes. In short, Stephans makes no showing of prejudice and there is no basis for believing that Perez-Herrera's statements affected the verdict.

3. Petitioner Stephans contends (82-1191 Pet. 16-32) that Agent Bumar violated his Fourth Amendment rights when, while searching Stephans' house pursuant to a search warrant, he answered the incoming telephone call from Perez-Herrera and then used Stephans' telephone to make outgoing calls to Perez-Herrera.

Stephans failed, however, to make a pretrial motion to suppress the Bumar—Perez-Herrera telephone conversations (see Pet. App. A18). Although he did move at trial to suppress Bumar's outgoing calls to Perez-Herrera (4 Tr. 839), he expressly conceded that Bumar's act of answering the incoming call from Perez-Herrera was lawful (4 Tr. 841; Pet. App. A18). Hence, the issue of the incoming call has not been preserved for review. Fed. R. Crim. P. 12(b)(3) and (f).

Furthermore, of the six outgoing calls that Bumar made to Perez-Herrera, the record indicates the place of origin of only two of them—and those were made from the Miami DEA office (Pet. App. A18). Stephans did not request a hearing or make any offer of proof concerning the place of origin of any of the calls.

On the merits too, Stephans' claim must fail. Stephans had no privacy interest in telephone conversations to which he was not a party merely because his telephone was used. See *United States* v. *Kane*, 450 F.2d 77 (5th Cir. 1971), cert. denied, 405 U.S. 934 (1972). Moreover, agents may lawfully answer a telephone pursuant to a search warrant that does not expressly authorize them to do so if they have "probable cause to 'believe that the evidence sought will aid in a particular apprehension or conviction.' " *Id.* at 85. Here, in view of the nexus between Stephans' house and drug dealing, such probable cause clearly existed.

In any event, any error in the admission of Perez-Herrera's statements was harmless, as we have already shown, and the court below properly disposed of Stephans' claim on that basis.

4. Petitioners Vadino and Natale contend (82-1207 Pet. 7-14; 82-1208 Pet. 7-14) that the district court's instruction on entrapment was defective because it failed to allocate the burden of proof to the government.

The district court gave the following entrapment instruction (7 Tr. 1438-1439; Pet. App. A22 n.5):

> Certain defendants assert that they were victims of entrapment as to the offense charged in the indictment.
>
> Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents, or informants, to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.
>
> On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is not entrapment.
>
> For example, it is not entrapment for a Government agent to pretend to be someone else, and to offer, either directly or through an informer, or other decoy, to engage in an unlawful transaction.
>
> If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit a crime such as charged in the indictment, whenever opportunity was afforded, and

> that Government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.
>
> On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty.

In its general burden of proof instruction, the district court expressly informed the jury that the burden of proof rests with the government (7 Tr. 1425). That this rule admits of no exception could not have been made any clearer than in the court's statement that "[t]he law does not require a defendant to prove his innocence *or produce any evidence at all* * * *" (*ibid.*; emphasis added). While this statement was not specifically repeated in the entrapment instruction, the jurors were advised at the outset of the charges that they "must follow all [the] instructions as a whole" and should not "give special attention to any one instruction * * *" (7 Tr. 1424). Reading the charge as whole—and especially in light of the court's repeated reference to the applicable *quantum* of proof within the entrapment instruction—the jury was sufficiently informed of the government's burden of proving beyond a reasonable doubt that petitioners were not entrapped. See *United States* v. *Johnson*, 605 F.2d 1025 (7th Cir. 1979) (en banc), cert. denied, 444 U.S. 1033 (1980) (holding general burden of proof instruction sufficient to inform jury of government's burden of proving nonentrapment).

Petitioners' reliance on decisions of other courts of appeals is unavailing. In *United States* v. *Wolffs*, 594 F.2d 77 (5th Cir. 1979), and *Notaro* v. *United States*, 363 F.2d

169 (9th Cir. 1966), the courts were concerned about the failure of the entrapment instruction to specify the applicable *quantum* of proof. Here, by contrast, the entrapment instruction expressly advised the jury that, in order to convict, it must find beyond a reasonable doubt that petitioners were not entrapped. Indeed, in *Wolffs* the Fifth Circuit explicitly distinguished that case from another decision of the same court, *United States* v. *Smith*, 588 F.2d 111 (5th Cir. 1979), on the ground that the entrapment instruction in *Smith* (like the one here) "[employed] reasonable doubt language * * *." 594 F.2d at 84.[7] Moreover, the Ninth Circuit, in a post-*Notaro* decision, upheld an instruction that failed to repeat that the burden of proof was on the government on the ground that the general burden of proof instruction was sufficient to inform the jury of the government's burden of proving nonentrapment. *Robison* v. *United States*, 379 F.2d 338, 345 (9th Cir. 1967).

Nor are petitioners aided by *United States* v. *Corrigan*, 548 F.2d 879 (10th Cir. 1977), or *United States* v. *Booz*, 451 F.2d 719 (3d Cir. 1971), cert. denied, 414 U.S. 820 (1973). In *Corrigan*, the court of appeals determined that the general instruction on burden of proof did not cure an instruction that failed specifically to allocate to the government the burden of proving that the defendant did not act in self-defense. However, in that case, unlike this one, the court found that the challenged instruction affirmatively suggested that the burden of proof rests with the defendants.[8]

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[7]In *Smith*, the court upheld an entrapment instruction even though it failed to allocate the burden of proof to the government, in light of "the instructions on entrapment and burden of proof, read as a whole * * *." 588 F.2d at 117; footnote omitted.

[8]Likewise, in *Booz*, the court's instruction affirmatively suggested that the defendant had the burden of proving an alibi defense. See *United States* v. *Beedle*, 463 F.2d 721, 724 (3d Cir. 1972).

Moreover, in *Corrigan* the court indicated that failure to allocate the burden of proof in the self-defense instruction "is not reversible error *per se*." 548 F.2d at 882. Rather, the court stated that "[t]he question is whether the instructions, taken as a whole, adequately informed the jury that [the prosecutor's] burden of proof beyond a reasonable doubt applied to defendant's affirmative defense." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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